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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JAYDEEP SHAH, M.D. M.A., .  
PLAINTIFF, .  
vs. . DOCKET NO. 5:18-CV-751-XR  
VHS SAN ANTONIO PARTNERS LLC .  
D/B/A BAPTIST HEALTH SYSTEM, .  
ET AL, .  
DEFENDANTS. .

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS  
BEFORE THE HONORABLE XAVIER RODRIGUEZ  
UNITED STATES DISTRICT JUDGE  
JANUARY 10, 2019

APPEARANCES:  
FOR THE PLAINTIFF: MARK A. WEITZ, ESQUIRE  
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REPORTED BY: GIGI SIMCOX, RMR, CRR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT  
SAN ANTONIO, TEXAS

1       (San Antonio, Texas; January 10, 2019, at 10:30 a.m., in  
2 open court.)

3           THE COURT: 18 civil 751, Jaydeep Shah versus VHS.

4           MR. WEITZ: Good morning, your Honor.

5           THE COURT: Morning.

6           Appearances, please.

7           MR. WEITZ: Mark Alan Weitz for Jaydeep Shah, M.D.  
8 M.A.

9           MR. ROGERS: Chris Rogers on behalf of all  
10 defendants, your Honor.

11          THE COURT: Thank you.

12          So let me start with something easy in this otherwise  
13 complicated case. Docket 3 was the initial motion to dismiss  
14 by the defendants and then there was an amended complaint  
15 filed, and so now Docket 10 is a motion to dismiss the first  
16 amended complaint. Does that moot Number 3?

17          MR. ROGERS: Yes, your Honor.

18          THE COURT: So we'll start with something easy. The  
19 motion to dismiss Docket Number 3 is dismissed as moot. So  
20 that leaves us just with 10.

21          So, I guess, let me turn to the defendant,  
22 Mr. Rogers. And so I know you say that doctors try this all  
23 the time and they are always unsuccessful with Sherman Act  
24 claims and tortious interference claims, but why doesn't the  
25 first amended complaint survive right now? What is so

1 deficient about it that it doesn't move to summary judgment?

2 MR. ROGERS: Yes, your Honor.

3 There's three issues. One is it doesn't allege  
4 antitrust injury, which is a required component of either a  
5 Sherman Act Section 1 claim, or a Sherman Act Section 2 claim.

6 The second reason is that he doesn't define a  
7 relevant product market. The response to the motion to  
8 dismiss goes into some length about the relevant geographic  
9 market, that a relevant market for Sherman Act purposes has  
10 two components, a relevant product market and a relevant --

11 COURT REPORTER: Slow down.

12 MR. ROGERS: Yes, ma'am.

13 -- has two components, a relevant product market and  
14 a relevant geographic market, and he did not allege any facts  
15 to support his alleged relevant product market.

16 And, third, his tortious interference claims are  
17 somewhat messy. Some of that is by, I believe, design. There  
18 are some claims that might be barred by an arbitration ruling  
19 that exists between Dr. Shah and his former group, STAR  
20 Anesthesia, and so he's tried to allege maybe tortious  
21 interference with a contract, maybe tortious interference with  
22 a prospective business relationship, and maybe tortious  
23 interference with the existing business relationship.

24 All of those claims, your Honor, we think fall down  
25 if the Sherman Act claims do not survive. And so we think

1 dismissal is appropriate at this moment.

2           There is a side issue, your Honor, about proper  
3 parties. We have alleged that the parent corporation's -- a  
4 number of facts have been alleged to them, and that the  
5 individual defendants really aren't tied into the nexus of  
6 facts that constitute as claims either.

7           THE COURT: So let's start with injury. So the  
8 doctor is claiming that his income has been affected, so why  
9 isn't that enough of an injury to survive?

10           MR. ROGERS: If I may, I can give you a brief  
11 background, just about the doctor, and then I'll answer your  
12 question directly.

13           Dr. Shah executed an income guarantee with North  
14 Central Baptist Hospital in 2006. That's not income per say,  
15 that's a promise from the hospital to pay a minimum for his  
16 services. He was an anesthesiologist providing anesthesiology  
17 services to patients at North Central Baptist.

18           THE COURT: Take deep breaths and slow down.

19           MR. ROGERS: Yes, your Honor.

20           So this guarantee existed in 2006. In 2007 Dr. Shah  
21 became a partner with STAR Anesthesia, a group that in 2012  
22 entered into an exclusive coverage agreement with the Baptist  
23 Health System, which includes North Central Baptist. That  
24 coverage agreement covered anesthesia services in general, not  
25 just the pediatric anesthesia services that Dr. Shah provided.

1           His guarantee was incorporated into that 2012  
2 coverage agreement. So as of 2012 Dr. Shah was a partner in  
3 STAR, providing services pursuant to a coverage agreement that  
4 included a minimum guarantee for pediatric anesthesia  
5 services. In 2016 that coverage agreement was amended to omit  
6 the guarantee, not to change anything else about the  
7 circumstances. STAR was still the exclusive provider of  
8 anesthesia services for the Baptist Health System.

9           I wish I could come up with a shorter word than  
10 anesthesia, to say it repeatedly, but I apologize.

11           And so STAR was still the exclusive provider.  
12 Dr. Shah was still a partner at STAR. But the elimination of  
13 that guarantee, and Dr. Shah alleges some actions on behalf of  
14 individuals at Baptist, poisoned the well between STAR and  
15 Shah.

16           STAR terminated Dr. Shah, which meant he was no  
17 longer permitted to provide services under the exclusive  
18 coverage agreement. He was still a member of the medical  
19 staff, and, in fact, got reappointed to the medical staff of  
20 the Baptist Health System thereafter, but he was no longer  
21 subject to that exclusive coverage agreement. And, as such,  
22 he was excluded from providing anesthesia services at North  
23 Central Baptist by the then CEO, who is now a defendant in the  
24 case.

25           So Dr. Shah alleges this exclusion is a Sherman Act

1 violation. And one component of that is antitrust injury,  
2 meaning harm to competition. So the cases are legion, but  
3 they say that in order to prove antitrust injury one has to  
4 show harm to competition, not to an individual competitor.

5 And when you boil it down, Dr. Shah's ultimate  
6 complaint is that the CEO of North Central Baptist didn't  
7 provide an exception to the exclusivity agreement with STAR  
8 Anesthesia, and that refusal prevented him from practicing at  
9 North Central Baptist.

10 He broadens that to include other exclusions, but,  
11 ultimately, if you look at the damages in the amended  
12 complaint, the damages are really about his practice. So he's  
13 alleging harm to his practice.

14 THE COURT: So basically you are saying, okay, he  
15 didn't meet the elements of injury for the Sherman Act, but  
16 you may be conceding that he's alleging injury for purposes of  
17 tortious interference?

18 MR. ROGERS: Yes, your Honor.

19 The tortious interference, one of the elements of the  
20 tortious interference claim, whether its under contract  
21 existing -- prospective business relationship or existing  
22 business relationship, if that cause of action is recognized  
23 by the Fifth Circuit, is an independent unlawful act. And in  
24 the response, Dr. Shah, I think, accepts that his independent  
25 unlawful act here is the Sherman Act violation.

1 THE COURT: Okay. Let me stop you here. The  
2 arbitration that was held --

3 MR. ROGERS: Yes, your Honor.

4 THE COURT: -- was it just between STAR and Dr. Shah,  
5 or was somehow Tenet implicated in that arbitration?

6 MR. ROGERS: Neither Tenet entity, nor VHS, the named  
7 entity here, who is the operating entity for the Baptist  
8 Health System, was a party to that arbitration. The  
9 arbitration was between STAR and Dr. Shah.

10 Petition to confirm that award was filed. The award  
11 found that STAR terminated Dr. Shah pursuant to appropriate  
12 contractual rights. We think that that's a barrier for  
13 Dr. Shah right now, and maybe why he didn't allege tortious  
14 interference with the contract between STAR and Shah, because  
15 we would say that that issue has been precluded by the  
16 arbitrator's finding.

17 THE COURT: Let me turn to you, Mr. Weitz.

18 MR. WEITZ: Yes, sir.

19 THE COURT: How do you survive on the antitrust?

20 MR. WEITZ: Your Honor, I believe that it's quite  
21 easy. First of all, let me go back to my counterpart's  
22 argument. First of all, we did allege a clear, relevant  
23 market. I think it would be very difficult to argue that we  
24 did not. It was clearly defined by Bexar County and the  
25 contiguous area, and I think that our petition, however one

1 might find some aspect of it wanting, does not want for  
2 detail. It's probably one of the most detailed that I've ever  
3 put together.

4           Secondly, injury. It is true that we do allege a  
5 personal injury, but we also allege that what happened with  
6 regard to the STAR/VHS contract affected 70 percent of the  
7 pediatric anesthesiologists in Bexar County and the contiguous  
8 counties. And we do that at paragraphs 34 through 37.

9           THE COURT: I was just going to ask you in one  
10 second.

11           MR. ROGERS: Paragraph 45. I'll stop.

12           THE COURT: Thank you. Hold on.

13           Okay. Go ahead. What pages?

14           MR. ROGERS: It's paragraphs -- easier if we go  
15 paragraphs: 34 through 37; paragraph 45; 51 through 53; 59;  
16 and 64 through 65.

17           And if the court would permit, I would also add this:  
18 One of the intriguing things about this case, and what makes  
19 it unique, and what makes it very survivable on the Sherman  
20 claims, is that Dr. Shah wasn't just anybody. He sat at the  
21 top of the food chain with regard to the provision of  
22 pediatric anesthesiology in Bexar County and the San Antonio  
23 area.

24           A hallmark of an antitrust damage is the limitation  
25 of adequate medical services. I think it's difficult, at



1 least at the pleading stage, to argue that the removal of a  
2 person of that stature, particularly one that not only headed  
3 up this exclusive arrangement but was also the head of Baptist  
4 Health Systems Inc. anesthesiology and pediatric, to argue  
5 that to have taken him out of the market did not affect the  
6 ability of yourself and myself to have our grandchildren  
7 receive adequate pediatric anesthesia, I think is a difficult  
8 one to maintain at least at the pleading level.

9           I think that the harm to medical care that the case  
10 law, and I'll use my colleague's -- is legion about what  
11 happens when you do something in a health setting that removes  
12 adequate health care. And I think it's very difficult to  
13 argue here from a damage standpoint under the Sherman Act that  
14 when they did what they did, that they didn't do that.

15           And I think one of the interesting facts about this  
16 case, and I guess if Mr. Rogers and I could go back and talk  
17 to his client and the clients, we might say this, what gave it  
18 wheels was when they reinstated his privileges. Because one  
19 of the things that if you do health care, you go into this law  
20 about privileges. And that's a tough nut to crack.

21           A hospital can decline privileges, make a  
22 determination that they should be limited, things of this  
23 nature. But once they put him in the pool of acceptable  
24 anesthesiologists and then told him -- and not just him -- but  
25 told people who wanted to use him, you can't do it. Why?

1 Well, we have an exclusive.

2 One of the things that intrigued me about this case  
3 was it's one of the first times in my life that I had had a  
4 true insider, not just a doctor that did some work, or a guy  
5 that -- but a guy that understood how it was put together and  
6 knew, well, wait a minute, if this surgeon wanted this  
7 anesthesiologist, we made an exception to the agreement.

8 Now, I think VHS's come back is, well, you know, why  
9 should we make an exception to Shah? Because of the volume of  
10 work that he did, to not have made an exception for purposes  
11 of health care. We no longer care about the Shah agreement.  
12 Mr. Rogers is correct about that. We went out there. They  
13 fought the good fight. It is on appeal, but both the court  
14 and counsel are aware of appealing arbitration awards.

15 But what I'm saying is the conduct we're talking  
16 about now flows through that, to the point where STAR is gone,  
17 Shah is there, children are sick, surgeons need Shah. And we,  
18 not only did we plead that, but we attached their letters,  
19 their emails, their entreaties, "please let me use Dr. Shah."  
20 So to go back to the court's question, I think I survive on my  
21 antitrust claim relatively easily in terms of market and harm.

22 One of the things I've always liked about our British  
23 colleagues, however, is that at certain points I think you  
24 have an obligation to point to the court where your adversary  
25 might be correct on something, and I think we can resolve the

1 Tenet issue by me doing that.

2           There is a case that I found. I apologize it was not  
3 in my first brief, but it's *Lenox McLaren versus Medtronic*  
4 *Inc.*, and I've got a copy for the Court. May I approach?

5           THE COURT: Yeah; thank you.

6           MR. WEITZ: *Lenox* is a February 7th, 2017 Tenth  
7 Circuit opinion. For our purposes what matters is Headnote  
8 15, which is actually on page 15 of the document. And I'll  
9 just tell the court basically what it says is this: In a  
10 Sherman Section 1 claim, you do have to have specific facts  
11 that tie your Honor to Mr. Weitz, Mr. Weitz to Mr. Rogers, in  
12 terms of a concerted conspiracy effort.

13           But when it comes to a Section 2 Sherman claim, I  
14 don't have to do that. And this case speaks to the notion of  
15 a single enterprise. And what it says is that the person at  
16 the top of the food chain can be brought in simply because  
17 everybody below him may have engaged in that. So while I  
18 agree with Mr. Rogers that a Section 1 claim may have a  
19 difficult time holding Tenet, a Section 2 claim clearly does.

20           And, just a brief history, Tenet got brought in  
21 because apparently at some point in the whole reorganization  
22 structure, the entity that my client had dealt exclusively  
23 with almost, a subsidiary, at some point sort of ceased to  
24 exist.

25           So I went back to the top of the chain, listed Tenet,

1 VHS Partners, and then everybody below that. But in a  
2 nutshell, that's how I survive the Sherman claim.

3 THE COURT: And the tortious interference?

4 MR. WEITZ: You don't have a right to create a  
5 contract that basically violates federal antitrust law. And  
6 if you look at the pleading, the only thing that the defendant  
7 seems to be arguing that I'm missing is the wrongful act.

8 The wrongful act is required for an existing  
9 contract. I believe I have that. Because, like I said, there  
10 was no justification for the STAR contract to have allowed  
11 VHS, whatever, to have used it to basically deprive Shah of  
12 his ability to work under circumstances where the main issue  
13 was proper medical care. So my wrongful act is the antitrust.

14 Unless the court has further questions, I'll --

15 THE COURT: No; thank you. So where are we at on the  
16 discovery process?

17 MR. WEITZ: We have complied with all the court's  
18 orders. We have had our 26(a) conference. We have exchanged  
19 26(a) disclosures. Shah is in the process of putting a  
20 request for production together, and I'm sure Mr. Rogers is  
21 probably doing the same thing.

22 THE COURT: So it's going to take me weeks before I'm  
23 able to draft an order on this, but the verbal order is: The  
24 motion to dismiss the first amended complaint is denied.

25 There is enough here to establish, at least on the basis of

1 the pleadings, the claims that have been asserted that all the  
2 elements have the sufficient amount of meat to the bones.

3 This is really an issue for summary judgment. And  
4 so, you know, I don't know whether you get past, you know,  
5 this, but there is, you know, the whole issue of the viable  
6 market and all of that. I mean, that's been alleged, and so  
7 now we're going to need evidence if you're going to still  
8 argue that claim as to why this is not a viable market.  
9 That's not proper for 12(b) purposes. We're really needing to  
10 argue a 56 motion.

11 So we are going to exchange discovery depositions of  
12 who?

13 MR. WEITZ: Contemplated depositions, obviously of  
14 the parties. We may need a deposition of somebody from STAR,  
15 just so we can understand how the exclusivity aspect went from  
16 there. And we've also -- and, like I said, we're  
17 preliminarily trying to figure this out, but I believe there  
18 is going to a deposition from someplace called Tejas, which  
19 was the de minimis anesthesiology provider. At this moment,  
20 those are the only ones I can think of.

21 THE COURT: From your perspective, what do you see?

22 MR. ROGERS: At the risk of stepping back a step, the  
23 case that they relied on in terms of the relevant market not  
24 being appropriate for a motion to dismiss was a motion to  
25 dismiss case based on a relevant market, *Concord Associates*,

1 Second Circuit, 2016.

2 I think, your Honor, we are presented with some  
3 challenges in terms of the scope of discovery in this matter.  
4 Ostensibly the relevant market is defined as all Level III and  
5 Level IV NICUs where pediatric anesthesiology services were  
6 provided, but I think there is an alternative market that's  
7 more general. Perhaps -- they are level -- obviously they're  
8 Level I and Level II NICUs, but, as well, there are general  
9 anesthesiology services in distinguishing that.

10 THE COURT: So let me suggest this. I mean, if you  
11 think you are so right on that, and that's wholly dispositive  
12 of this, should we tier discovery just to tee up the issue of  
13 relevant market?

14 MR. ROGERS: And injury. I would like to consider  
15 that, your Honor, and present some proposals to Mr. Weitz and  
16 we'll come back to you with a suggestion if we can reach an  
17 agreement, or if we can't.

18 THE COURT: So, I mean, if you are dead set that  
19 that's going to be successful, then, you know, why don't the  
20 two of you talk about trying to tier discovery. Let's look at  
21 tiering up -- teeing up a motion for summary judgment, just on  
22 the issues of relevant market and injury, and then find out  
23 whether or not those are dispositive, and then we continue on  
24 from there.

25 MR. WEITZ: I think that's a prudent way to proceed.

1 THE COURT: Okay. Well, let's go forward on that  
2 basis and I'll let you work out the details.

3 (Concludes proceedings.)

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5 CERTIFICATE

6 I, Gigi Simcox, RMR, CRR, Official Court Reporter for the  
7 United States District Court, Western District of Texas, do  
8 hereby certify that the foregoing is a true and correct  
9 transcript, to the best of my ability and understanding, from  
10 the record of the proceedings in the above-entitled and  
11 numbered matter.

12 *s/Gigi Simcox, RMR, CRR*  
13 Gigi Simcox, RMR, CRR  
14 Official Court Reporter  
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